

## Message Text

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PAGE 01 STATE 204437

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ORIGIN EA-14

INFO OCT-01 ISO-00 CU-05 L-03 H-03 SCI-06 PA-04 PRS-01

USIA-15 RSC-01 /053 R

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FM SECSTATE WASHDC

TO USLO PEKING

C O N F I D E N T I A L STATE 204437

E.O. 11652:GDS

TAGS: SCUL, CH

SUBJECT: ARCHEOLOGICAL EXHIBITION NEGOTIATIONS

1. THE DEPT AGREES THAT WE MUST MOVE AHEAD TO CONCLUDE AGREEMENT WITH THE CHINESE AND WE CLEARLY DO NOT WISH TO LET THE FORCE MAJEURE ISSUE JEOPARDIZE THE EXHIBITION.

IN THIS CONNECTION RE PARA 6 PEKING 1479 AND PARA 2 PEKING 1494 IT WAS CONSIDERED THAT MAY 9 ENGLISH TEXT PROVIDED BY CHINESE WAS CAPABLE OF RESTRICTIVE INTERPRETATION, WAS INFERIOR TO BRITISH, CANADIAN AND SWEDISH ENGLISH TEXTS AND DID NOT TRACK CHINESE TEXT, AND IT WAS THESE CONSIDERATIONS WHICH HAVE MOTIVATED US IN SEEKING AMELIORATIVE CHANGES.

2. WITH REGARD TO THIS PROBLEM OF FORCE MAJEURE, WE SEE THREE ALTERNATIVES: (1) TO CAVE IN ON THE FORCE MAJEURE ISSUE WITHOUT FURTHER TO-DO, (2) TO RESERVE OUR POSITION THROUGH SOME AMBIGUOUS FORMULA, AND (3) TO SEEK TO GET THE CHINESE TO CHANGE THEIR SUBSTANTIVE POSITION. IF WE PURSUE EITHER OPTION 2 OR 3 AND THEY ARE REJECTED BY THE CHINESE, WE WOULD BE PREPARED TO CAVE AND ACCEPT THE  
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PAGE 02 STATE 204437

CHINESE POSITION.

3. THE FIRST OPTION IS THE QUICKEST AND CLEANEST SOLUTION. WHILE WE HAVE BASIC DIFFICULTIES, OF WHICH USLO IS AWARE, WITH ACCEPTING THE CHINESE POSITION ON FORCE MAJEURE, WE WOULD BE PREPARED TO TAKE SOUNDINGS ON HILL ON BASIS

PRESENT TEXT OF LETTER (RESTRICTED TO REDUCED LIABILITY ONLY FOR THREE CONTINGENCIES MENTIONED) AND BELIEVE WE HAVE SUFFICIENT AUTHORITY UNDER OUR LEGISLATION TO PROCEED ON THIS BASIS, IF NECESSARY. AT THE SAME TIME OUR POTENTIAL CONGRESSIONAL DIFFICULTIES AND THE CONSIDERABLE AMOUNT OF MONEY POTENTIALLY INVOLVED MAKE IT ESSENTIAL THAT WE SATISFY OURSELVES AND HAVE A CLEAR RECORD THAT WE HAVE MADE ALL REASONABLE EFFORTS TO MINIMIZE THE RISK OF LIABILITY BEYOND THE ORIGINAL EXPECTATIONS WHICH WE CONVEYED TO THE CONGRESS. IN ADDITION, WE DO NOT WISH TO REINFORCE THE CHINESE IN THEIR APPARENT VIEW THAT THE US SIDE CAN ALWAYS FIND WAYS AROUND LEGAL POINTS.

4. THE SECOND ALTERNATIVE IS ALONG THE LINES SUGGESTED BY USLO, NAMELY TO CREATE AMBIGUITY BY ACCEPTING THE TEXT OF LETTER AS IT IS, BUT RESERVING OUR POSITION ABOUT FORCE MAJEURE IN AN ORAL PRESENTATION. IN THIS APPROACH WE WOULD INFORM THE CHINESE THAT WE NOTE THEIR POSITION ON THE ISSUE OF FORCE MAJEURE AND CONTINUE TO HAVE DIFFICULTY WITH IT, BUT WE ARE PREPARED TO ACCEPT THE TEXT OF THE LETTER AS IS AND ARE CONFIDENT THAT IF AN UNFORTUNATE (AND HIGHLY UNLIKELY) NON-SPECIFIED CONTINGENCY ARISES, WE WOULD CONSULT TOGETHER ABOUT OUR PROBLEM. THE CHINESE, WE BELIEVE, ARE MORE LIKELY TO ACCEPT THIS APPROACH THAN ANY OTHER WHICH ATTEMPTS TO RESERVE OUR POSITION AND THUS IT HOLDS OUT SOME PROMISE OF AVOIDING OR AT LEAST POSTPONING A CAVE-IN. IT IS UNCERTAIN, OF COURSE, WHETHER THE CHINESE, IF THEY SHOULD BE PREPARED TO LIVE WITH THIS APPROACH, WOULD ACTUALLY SETTLE FOR LESS THAN FULL INDEMNITY IN THE EVENT LIGHTNING OR SOME OTHER UNSPECIFIED ACT OF FORCE MAJEURE STRIKES THE EXHIBIT. IN SUCH AN EVENTUALITY, THE AMBIGUOUS FORMULA ON FORCE MAJEURE COULD LEAD TO ACRI-  
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PAGE 03 STATE 204437

MONIOUS NEGOTIATIONS OVER INDEMNIFICATION. IF OUR JUDGEMENT IS THAT THE CHINESE WOULD REMAIN ADAMANT ABOUT RECEIVING FULL INDEMNITY, OUR POSTPONED CAVE-IN COULD BE EVEN MORE DAMAGING AND VISIBLE THAN SIMPLY CAVING NOW AS IN OPTION 1. IF, HOWEVER, WE BELIEVE THEY WOULD HAVE SOME FLEXIBILITY AND THAT THERE IS A REASONABLE CHANCE THAT THEY WOULD ACCEPT LESS THAN FULL INDEMNITY, THIS OPTION BECOMES MORE ATTRACTIVE. FYI: WE HAVE REJECTED OPTION OF MAKING ABOVE RESERVATION IN DIPLOMATIC NOTE AS WE BELIEVE THIS AMBIGUITY IN WRITTEN TEXT COULD AFFECT OUR

FLEXIBILITY IN HANDLING MATTER AND GIVE US SERIOUS DIFFICULTY IF WE LATER NEED TO SEEK APPROPRIATION FROM CONGRESS FOR FULL INDEMNITY. THUS, IF SECOND ALTERNATIVE IS CHOSEN, WE WOULD TAKE SOUNDINGS ON HILL ON SAME BASIS AS UNDER FIRST ALTERNATIVE. END FYI.

5. THE THIRD ALTERNATIVE IS TO MAKE ONE LAST EFFORT TO GET THE CHINESE TO CHANGE THEIR SUBSTANTIVE POSITION, DRAWING ON MATERIAL IN PARA 9A OF DEPTTEL 170833. ON THIS APPROACH WE WOULD BE PREPARED TO ACCEPT THE TEXT DESIRED BY THE CHINESE SIDE BUT WOULD SEEK A VERBAL UNDERSTANDING THAT OTHER ACTS OF FORCE MAJEURE WOULD IN FACT BE COVERED. WE WOULD ALSO EMPLOY SOME AMELIORATIVE LANGUAGE IN DIPLOMATIC NOTE SUCH AS SUGGESTED BY USLO ON NON-DISCRIMINATORY TREATMENT, OR OTHER FORMULATION PROVIDED THERE IS SUCH VERBAL UNDERSTANDING. THIS COURSE MIGHT BE SEEN BY THE CHINESE AS A FACE-SAVING WAY OF HELPING US TO MEET OUR CONGRESSIONAL PROBLEM. IT MIGHT NOT BE PRODUCTIVE TO PURSUE THIS APPROACH AT THE HSIAO TEH OR EVEN THE LIN PING LEVEL AND THE REPRESENTATION MIGHT HAVE TO BE MADE AT THE BRUCE-CHIAO KUAN-HUA LEVEL. WE CONSIDER WE WOULD HAVE TO HAVE STRONG OVERRIDING REASONS NOT TO DO THIS IF THERE IS ANY REASONABLE CHANCE OF SUCCESS. IF THERE WERE ANY REASONABLE CHANCE OF THIS WORKING, THIS APPROACH WOULD SEEM TO BE THE MOST DESIRABLE. EVEN IF REJECTED BY THE CHINESE, WE WOULD BE ABLE TO DEMONSTRATE THAT WE HAD MADE EVERY REASONABLE EFFORT TO SECURE THE TERMS PRESENTED TO THE CONGRESS AND WE WOULD HAVE AVOIDED THE PROBLEM INHERENT IN THE AMBIGUOUS FORMULA. WE RECOGNIZE THAT THE POLITICAL COST OF CAVING IF WE FAILED AT THE BRUCE-CHIAO KUAN-HUA LEVEL  
CONFIDENTIAL  
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PAGE 04 STATE 204437

WOULD BE HIGHER THAN AT A LOWER LEVEL, BUT BELIEVE IT WOULD BE LESS THAN IF WE HAD TO CAVE LATER AND MORE VISIBLY, POSSIBLY AT THE SAME HIGH LEVEL IN THE EVENT THE CONTINGENCY ARISES AND THE CHINESE POSITION REMAINS FIRM.

6. THE DEPT REQUESTS USLO'S VIEWS ON THESE ALTERNATIVES AND ITS RECOMMENDATION AS TO THE COURSE WHICH WE SHOULD FOLLOW, PARTICULARLY CONCERNING THE CHANCE OF SUCCESS OF THIRD ALTERNATIVE AT HIGHER LEVEL AND LIKELIHOOD UNDER SECOND ALTERNATIVE OF CHINESE FLEXIBILITY IN SETTLING FOR REDUCED INDEMNITY IN CASE OF, FOR EXAMPLE, LIGHTNING, TORNADOES, ETC. WE WILL PROMPTLY SEND INSTRUCTIONS UPON RECEIPT OF YOUR ASSESSMENT. KISSINGER

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## Message Attributes

**Automatic Decaptioning:** X  
**Capture Date:** 01 JAN 1994  
**Channel Indicators:** n/a  
**Current Classification:** UNCLASSIFIED  
**Concepts:** ARCHEOLOGY, CULTURAL PROPERTY, CULTURAL EXCHANGE AGREEMENTS, CULTURAL EXHIBITS, NEGOTIATIONS  
**Control Number:** n/a  
**Copy:** SINGLE  
**Draft Date:** 17 SEP 1974  
**Decaption Date:** 01 JAN 1960  
**Decaption Note:**  
**Disposition Action:** RELEASED  
**Disposition Approved on Date:**  
**Disposition Authority:** cunninfx  
**Disposition Case Number:** n/a  
**Disposition Comment:** 25 YEAR REVIEW  
**Disposition Date:** 28 MAY 2004  
**Disposition Event:**  
**Disposition History:** n/a  
**Disposition Reason:**  
**Disposition Remarks:**  
**Document Number:** 1974STATE204437  
**Document Source:** CORE  
**Document Unique ID:** 00  
**Drafter:** L/EA:EVERVILLE:CU/EA:MZINOMAN  
**Enclosure:** n/a  
**Executive Order:** GS  
**Errors:** N/A  
**Film Number:** D740261-0203  
**From:** STATE  
**Handling Restrictions:** n/a  
**Image Path:**  
**ISecure:** 1  
**Legacy Key:** link1974/newtext/t19740938/aaaabfyc.tel  
**Line Count:** 165  
**Locator:** TEXT ON-LINE, ON MICROFILM  
**Office:** ORIGIN EA  
**Original Classification:** CONFIDENTIAL  
**Original Handling Restrictions:** n/a  
**Original Previous Classification:** n/a  
**Original Previous Handling Restrictions:** n/a  
**Page Count:** 4  
**Previous Channel Indicators:**  
**Previous Classification:** CONFIDENTIAL  
**Previous Handling Restrictions:** n/a  
**Reference:** n/a  
**Review Action:** RELEASED, APPROVED  
**Review Authority:** cunninfx  
**Review Comment:** n/a  
**Review Content Flags:**  
**Review Date:** 17 JUL 2002  
**Review Event:**  
**Review Exemptions:** n/a  
**Review History:** RELEASED <17 JUL 2002 by martinml>; APPROVED <06 MAR 2003 by cunninfx>  
**Review Markings:**

Declassified/Released  
US Department of State  
EO Systematic Review  
30 JUN 2005

**Review Media Identifier:**  
**Review Referrals:** n/a  
**Review Release Date:** n/a  
**Review Release Event:** n/a  
**Review Transfer Date:**  
**Review Withdrawn Fields:** n/a  
**Secure:** OPEN  
**Status:** NATIVE  
**Subject:** ARCHEOLOGICAL EXHIBITION NEGOTIATIONS  
**TAGS:** SCUL, CH, US  
**To:** PEKING  
**Type:** TE  
**Markings:** Declassified/Released US Department of State EO Systematic Review 30 JUN 2005